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No. 83-1117

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

HERMAN V. KREZDORN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITIONER'S REPLY TO THE MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

This reply is being filed for the sole purpose of correcting several highly misleading assertions by the Respondent United States in its brief "Memorandum" in opposition to Petitioner's petition for writ of certiorari.

1. The United States asserts that Petitioner's contentions "are not ripe for review by this Court." (Mem., p.2) That is absolutely false. This interlocutory appeal was initiated *by the United States* from the district court's dismissal of the conspiracy count against Petitioner. Any delay in the trial of the charges against Petitioner is entirely due to (a) the United States adding a conspiracy charge against Petitioner for the first time in the superseding indictment following his successful appeal from his forgery convictions, and (b) the United States appealing the district court's pre-trial dismissal of the conspiracy charge.

2. The United States asserts that the Fifth Circuit's en banc decision "places petitioner in precisely the same position he would have occupied if the district court had refused to exclude the evidence." (Mem., p.3) That, too, is erroneous, and reflects either a misunderstanding or a misrepresentation as to the posture of this case.

First of all, this is not an appeal from the granting of a motion to suppress or exclude evidence; this appeal involves the dismissal of an entire conspiracy count of an indictment.

Second, and more importantly, at the conclusion of Petitioner's first trial, at which the evidence of extraneous forgeries was improperly admitted, Petitioner stood convicted of four counts of forging border-crossing cards. At that time, he had not even been *charged* with

conspiracy. Only *after* Petitioner obtained an appellate reversal of the forgery convictions did the United States elect to add the conspiracy count in the superseding indictment.

No trial has even been had on the charges alleged in the superseding indictment. That is because the district court dismissed the conspiracy count on the grounds of prosecutorial vindictiveness, and the United States filed this interlocutory appeal from that dismissal. But if the Fifth Circuit's en banc decision reversing that dismissal is allowed to stand, Petitioner very clearly will *not* be in the "same position" of facing the four forgery counts, but rather he will be facing those four counts *plus* the new conspiracy count.

3. The United States asserts that if this Court denies certiorari, and Petitioner is convicted of conspiracy and the conviction is affirmed, Petitioner "will then be able to present his contentions to this Court . . ." (Mem., p.3) Again, the assertion is plainly false and misleading. As this case now stands, the Fifth Circuit has held that the post-appeal addition of the conspiracy count against Petitioner is not barred by the doctrine of prosecutorial vindictiveness or the rule of *Blackledge* v. *Perry*, 417 U.S. 21 (1974). If this Court refuses to review that holding, it is very likely—and surely the United States will take the position—that subsequent appellate review will be precluded by virtue of the doctrines of *stare decisis* and the law of the case.

In short, Petitioner's contentions are clearly ripe for review at this time. Petitioner again urges that this Court should grant his petition for writ of certiorari.

Respectfully submitted,

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